IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ESTATE OF CHARLES C. HASELWOOD, and JOANNE I. HASELWOOD, husband and wife,

Petitioners,

v.

BREMERTON ICE ARENA, INC., a Washington corporation; GREGORY S. MEAKIN and DEBORAH A. MEAKIN, husband and wife,

Defendants,

RV ASSOCIATES, Inc., a Washington corporation,

Respondent.

MALLORY ENTERPRISES, INC., dba ABBEY CARPETS, a Washington corporation; ROBISON MECHANICAL INC., a Washington corporation; JPL HABATABILITY, INC., A Washington corporation; CONSOLIDATED ELECTRICAL DISTRIBUTORS, Inc., dba STUSSER ELECTRIC CO/EAGLE ELECTRIC, a Washington corporation; ALASKA CASCADE FINANCIAL SERVICES, INC., ASSIGNEE FOR Sound Glass Sales, Inc., a Washington corporation; SULLIVAN HEATING & COOLING, INC., a Washington corporation; STIRNCO STEEL STRUCTURES, INC., a Washington corporation; EAGLE ELECTRIC, INC., a Washington corporation; HANSON SIGN COMPANY, INC., a Washington corporation; STRIPE RITE, INC., a Washington corporation,

Defendants.

No. 80411-7

MOTION TO STRIKE

I. Identity of Moving Party & Relief Requested.

Respondents the Haselwoods ask the Court to strike portions of Petitioner RV Associates' Supplemental Brief that (a) raise issues that are not before this Court; (b) are false; and (c) discuss evidence that RV admits is not in the record.

II. Facts Relevant To Motion.

In its supplemental brief, RV argues that the trial court erred in ruling that RV could not remove any improvements absent lien priority. Supp. Br. 8; CP 764, ¶ 2. RV did not cross-petition for review of this issue, and did not raise this issue in its answer to the Haselwoods' petition for review. The Court did not accept review of this issue, nor could it have, as it was not raised.

RV also seeks attorney fees, which RV also failed to raise in its answer. Supp. Br. 8-9.

RV incorrectly claims that the Haselwoods raised RV's failure to invoke RCW's 60.04.221's stop-notice procedures "for the first time on appeal." Supp. Br. 6. The Haselwoods raised this issue in their January 12, 2005 motion for summary judgment. Relevant page attached as Appendix A. RV did not offer evidence in response, though it claims that it would have done so if the issue had been raised. Supp. Br. 6-7. The Haselwoods raised the issue

on appeal simply to show that RV had a statutory remedy, but failed to use it.

RV also incorrectly claims that the trial court ruled that RV had a valid lien. Supp. Br. 7, 8, 9 (citing CP 609). Clerk's Papers 609, an order granting in part the Haselwoods' motion for summary judgment, states simply that RV's lien does not attach to the real property or concession agreement, but "*may* attach to certain improvements." Attached as Appendix B (emphasis supplied). The appellate court refused to address the validity of RV's improvement lien, holding that the trial court had not decided the issue. ***Haselwood v. Bremerton Ice Arena, Inc.***, 137 Wn. App. 872, 891 n.7, 155 P.3d 952 (2007), *rev. granted*, 163 Wn.2d 1017 (2008).

III. Grounds For Relief And Argument.

The Court should strike arguments that RV failed to raise in its answer to the petition for review. RAP 13.7(b) limits the scope of review to the issues raised in the petition for review and answer. ***Biggers v. City of Bainbridge Island***, 162 Wn.2d 683, 692-93, 169 P.3d 14 (2007) (striking an issue argued in the supplemental brief that was not raised in the petition for review). RV did not cross-petition for review or raise in its answer the trial court's correct ruling that RV cannot remove absent lien priority. Nor did

RV raise attorney fees. The Court should strike these arguments and decline to consider these issues.

The Court should also strike RV's inaccurate claim that the Haselwoods raised RV's failure to invoke stop-notice for the first time on appeal, and RV's improper reference to facts outside of the record on review. Contrary to RV's claims, the Haselwoods raised RV's failure to invoke stop-notice at trial (App. A, pg. 9). RV's claim that it would have submitted additional evidence if the Haselwoods had raised this issue is simply false – the Haselwoods did raise the issue and RV failed to respond. Supp. Br. 6-7. RV's discussion of evidence it admits is not in the record is wholly improper and the Court should strike it. RAP 10.3(a)(5) & (6); ***In re Det. of Broten***, 130 Wn. App. 326, 340, 122 P.3d 942 (***citing State v. Byrd***, 30 Wn. App. 794, 800, 638 P.2d 601 (1981), *rev. denied*, 158 Wn.2d 1010 (2006)).

This argument is meritless in any event. If RV had invoked stop-notice and the Haselwoods refused to withhold the amount RV "claimed to be due" then the Haselwoods' deed of trust and fixture filings would have been "subordinated" to RV's lien, if any. RCW 60.04.221(3) & (7). The Court should strike RV's false assertion

that invoking stop-notice "would have provided no protection." Supp. Br. 7.

The Court should also strike the following false statements:

- The "Haselwood[s] argue [that RV's] lien cannot attach to the improvement." Supp. Br. 2. The Haselwoods argue the opposite – that if RV has a valid lien, then it attaches to improvements only. Haselwoods' Supplemental Brief.
- The Concession Agreement is "in essence, a long term lease." Supp. Br. 2. The Concession Agreement expressly states that it is not a lease. CP 840.
- The Haselwoods recorded their deed of trust "[r]ecognizing that the improvements attach to and become part of the realty." Supp. Br. 3. This claim is baseless. RV raised the argument that the improvements become part of the realty for the first time in its reply brief. Haselwoods' motion for reconsideration at 5, relevant pages attached as Appendix C. The Haselwoods sought an opportunity to respond to the new argument, but the appellate court refused. *Id.* at 5-6.

IV. Conclusion.

The Court should strike RV's arguments on removal and attorney fees as these issues are not before this Court. The Court should also strike the reference to evidence that is not in the record, and RV's false statements.

RESPECTFULLY SUBMITTED this 10th day of June 2008.

Wiggins & Masters, P.L.L.C.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed or caused to be mailed a copy of the foregoing **MOTION TO STRIKE** this 10th day of June, 2008 to the following counsel of record at the following addresses:

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set forth in previous pleadings that because of this leapfrog priority, it can use the date it commenced work – September 2002 – as the effective date of its lien. However, none of the creditors in this matter, except for Plaintiff Haselwood through the Concession Agreement, have a claim of lien upon any lot or parcel of land. The Court has previously ruled that Defendant R.V.'s claim of lien does not attach to the real property under the facility commonly known as the Bremerton Ice Arena, the Concession Agreement. Accordingly, this leapfrog exception to the general rule of priority found in RCW 60.04.061 does not apply to Defendant RV. The Court also ruled that Defendant R.V.'s claim of lien may attach to certain improvements to the facility commonly known as the Bremerton Ice Area, however, because the leapfrog exception is not available to Defendant R.V., the Plaintiff Haselwoods' Deed of Trust, Commercial Security Agreement and Financing Statement is the first and paramount security interest in such improvements.

Finally, it should be noted, during the course of a construction project, a potential lien claimant who has not been timely paid may send a Notice to Lender, requesting direct payment, to the lender providing interim or construction financing. RCW 60.04.221. In this case, Defendant RV did not send a Notice to Lender to Plaintiff Haselwood.

CONCLUSION

As a matter of law, Plaintiff Haselwood's Deed of Trust, Commercial Security Agreement and Financing Statement is the first and paramount interest in the Property. The land underlying the facility commonly known as the Bremerton Ice Arena is owned by the City of Bremerton. Through the Concession Agreement, Plaintiff Haselwood's Deed of Trust, Commercial Security Agreement and Financing Statement is the only security interest in the land underlying the Property. Plaintiff Haselwoods' have a security interest in the Concession Agreement as a result of specifically negotiated contractual terms with the City of Bremerton,

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Appendix A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITSAP

CHARLES C. HASELWOOD and JOANNE L. HASELWOOD, husband and wife,

Plaintiffs,

vs.

BREMERTON ICE ARENA, INC., a Washington corporation; GREGORY S. MEAKIN and DEBORAH A. MEAKIN, husband and wife; RV ASSOCIATES, INC., a Washington corporation; MALLORY ENTERPRISES, INC. dba ABBEY CARPETS, a Washington corporation; ROBISON MECHANICAL, INC., a Washington corporation; JPL HABITABILITY, INC., a Washington corporation; CONSOLIDATED ELECTRICAL DISTRIBUTORS, INC. dba STUSSER ELECTRIC CO./EAGLE ELECTRIC, a Washington corporation; ALASKA CASCADE FINANCIAL SERVICES, INC., assignee for Sound Glass Sales, Inc., a Washington corporation; SULLIVAN HEATING & COOLING, INC., a Washington corporation; STIRNCO STEEL STRUCTURES, INC., a Washington corporation; EAGLE ELECTRIC. INC., a Washington corporation; HANSON SIGN COMPANY. INC., a Washington corporation; STRIPE RITE. INC., a Washington corporation.

Defendants.

Case No.: 03 2 02825 0

ORDER ON HEARING ON SUMMARY JUDGMENT

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Appendix B

THIS MATTER having come on for hearing before the undersigned Judge at the above-entitled court upon the motion of Defendant, RV Associates. Inc. P.S. for summary judgment against Plaintiffs and the other Defendants; and the court having considered the following documents submitted regarding said motion:

1. Plaintiff's Complaint
2. Defendant RV Associates, Inc. P.S.'s Answer, Affirmative Defenses. Counter-claims and Cross-claim to Plaintiff's Complaint;
3. Defendant RV Associates, Inc. P.S.'s Motion for Summary Judgment:
4. Defendant RV Associates, Inc. P.S.'s Memorandum in Support of RV's Motion for Summary Judgment;
5. Declaration of Warren Lumsden in Support of Defendant RV's Motion for Summary Judgment;
6. Haselwood's Response to RV, Associates, Inc.'s, Motion for Summary Judgment
7. Declaration of Jim Wootan in Support of Haselwood's Response to RV. Associates, Inc.'s, Motion for Summary Judgment;
8. Declaration of Wayne Davis in Support of Haselwood's Response to RV. Associates, Inc.'s, Motion for Summary Judgment;
9. Declaration of Kenneth L. Kambich in of Haselwood's Response to RV. Associates, Inc.'s, Motion for Summary Judgment;
10. Response of Hanson to RV Associates, Inc.'s Motion for Summary Judgment;
11. Response of Mallory and Robison to RV, Associates. Inc.'s, Motion for Summary Judgment;
12. Defendant RV Associates Reply to Defendant's Response for Summary Judgment;
13. Supplemental Declaration of Steve Davis;
14. Haselwood's Opposition to RV Associates, Inc.'s. Reply to Response to Motion for Summary Judgment;
15. Haselwood's Notice of Insufficiency of Discovery Response from Defendant RV Associates;
16. Haselwood's Supplemental Memorandum and Response to RV Associates. Inc.'s Answer to Haselwood's First set of Interrogatories and Request for Production to Defendant RV Associates. Inc.;
17. Second Supplemental Declaration of Steve Davis;
18. Declaration of Frank Turkowski;
19. Declaration of Aaron Stegmeier;
20. Defendant RV Associates Reply to Plaintiff Haselwood's Supplemental Memorandum [Re: RV's Summary Judgment Motion] & Response to RV Associates, Inc.'s Answer to Interrogatories and Request for Production with attachments;

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a. Plaintiff Haselwood's First Set of Interrogatories and Request for Production to Defendant RV Associates, Inc. with Answers;
b. Defendant RV Associates' Supplemental Answers to Plaintiff's First Set of Interrogatories and Request for Production.

and the court having considered the arguments of counsel. it is:

Now, therefore. it is hereby ORDERED, ADJUDGED AND DECREED:

1. That Defendant's Motion for Summary Judgment is hereby DENIED in part and GRANTED in part as hereinafter set forth.

2. That Defendant RV Associates, Inc's Lien recorded under Auditor's File No. 200307160120 ("Lien") may be amended to comply with RCW 60.04 as further ordered by the Court.

3. That Defendant RV Associates, Inc.'s Lien does not attach to the real property owned by the City of Bremerton underlying and adjacent to the facility commonly known as the Bremerton Ice Arena.

4. That Defendant RV Associates, Inc.'s Lien does not attach to the corporate entity Bremerton Ice Arena, Inc.

5. That Defendant RV Associates. Inc.'s Lien does not attach to the Concession Agreement entered into by and among the City of Bremerton and the Defendant Bremerton Ice Arena, Inc. on or about August 9, 2002.

6. That Defendant RV Associates. Inc's Lien may attach to certain improvements

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to the facility commonly known as the Bremerton Ice Arena pursuant to further Order of the Court.

DONE IN OPEN COURT this 24th day of September. 2004.

THEODORE SPEARMAN
JUDGE

PRESENTED BY:

SHIERS, CHREY, COX,
DIGIOVANNI & ZAK, LLP

By: _____
GARY T. CHREY, WSBA # 5464
KENNETH L. KAMBICH, WSBA #28141
Attorneys for Plaintiff

COPY RECEIVED AND APPROVED FOR ENTRY:

This ___ day of September, 2004

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Appendix B

> **RCW 60.04.051**: The lot, tract, or parcel of land which is improved is subject to a lien . . . .

The statute uses different language in different places to denote two different things: "Where different language is used in different places within a statute, it is presumed there is a difference in intent." ***State ex rel. Pub. Disclosure Comm'n v. Washington Educ. Ass'n***, 156 Wn.2d 543, 555, 130 P.3d 352 (2006), *cert. granted*, 127 S. Ct. 35 (2006); *accord* ***State v. Roberts***, 117 Wn.2d 576, 586, 817 P.2d 855 (1991). The Court should apply this well established principle.

The Haselwoods pointed out that RV elided the distinction between these two liens, failing to even address the lien on improvements under § .021. BR 17-18, 28-30. RV's Reply never addresses the issue, much less claims that there are not two types of liens under RCW 60.04. The Court, seemingly following RV's lead, also barely mentions § .021, but goes much further than RV to conclude that Chapter 60.04 "clearly establishes a single lien that attaches to the realty through the improvements." Opinion at 12.

RV argued in reply that its lien should attach to the land through the improvements. This Court went beyond RV's arguments, however, holding that a lien on improvements is no

Appendix C

different than a lien on the land for purposes of relation back. Opinion at 15-16. As discussed below, this conclusion flies directly in the face of the plain language of the relation-back statute, RCW 60.04.061, and contradicts this Court's initial (correct) determination that the lien cannot attach to the City's real property. Opinion at 8-11. Unfortunately, the Court did not clearly raise this question at the oral argument or ask for additional briefing.

The Court credited RV's reply argument that "the improvements became part of the lessee's interest in the land" even though the Court had recognized that BIA owned the improvements and had no interest in the land! Opinion at 3. The great weight of authority is that this Court should have disregarded this argument entirely. *See, e.g.*, ***Smith v. Arnold***, 127 Wn. App. 98, 112-13, 110 P.3d 257 (2005) ("'An issue raised and argued for the first time in a reply brief is too late to warrant consideration'") (citing ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)). At the very least, however, the Court should have called for additional briefing to give the Haselwoods their due process right to be heard. RAP 12.1(b).

Appendix C